Leg / HPSCI (Budget)

14 August 1989
OCA 2903-89

MEMORANDUM FOR: Inspector General

FROM: [redacted] STAT
Legislation Division
Office of Congressional Affairs

SUBJECT: HPSCI Report - FY90 Intelligence Authorization Act

Attached for your information are relevant portions of the House Permanent Select Committee on Intelligence Report on the Intelligence Authorization Act for Fiscal Year 1990, which pertain to CIA Inspector General reports.

[redacted] STAT

Attachment

OCA/LEG/[redacted] (14 Aug 89) STAT

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101ST CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 101-215
Part 1

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1990

AUGUST 3, 1989.—Ordered to be printed

Mr. BEILENSON, from the Permanent Select Committee on Intelligence, submitted the following

REPORT

[To accompany H.R. 2748]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 2748) to authorize appropriations for fiscal year 1990 for the intelligence and intelligence-related activities of the U.S. Government, for the Intelligence Community Staff, for the Central Intelligence Agency Retirement and Disability System, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments (stated in terms of the page and line number of the introduced bill) are as follows:

On page 10, after line 13, insert the following:

CIA INSPECTOR GENERAL REPORTS

SEC. 402. Section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q) is amended by striking the first period in subsection (c) and inserting in lieu thereof "and listing the title or subject of each inspection, investigation or audit conducted during the reporting period.", and by adding at the end thereof the following new subsection:

"(f) Any report of an inspection, investigation, or audit conducted by the Office of Inspector General which has been requested by either committee."

On page 17, after line 16, add the following:

APPENDIX A

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 18, 1989.

Hon. ANTHONY C. BEILENSON,
Chairman, Permanent Select Committee on Intelligence,
House of Representatives, Washington, DC.

DEAR CHAIRMAN: This represents the views of the Department of Justice concerning a proposed amendment to H.R. 2748, the Fiscal Year 1990 Intelligence Authorization Bill currently pending before your committee. The proposed amendment would do two things. First, it would add to the semiannual reports that the Director is obligated to file concerning the Inspector General's activities a requirement that it list "the title or subject of each inspection, investigation or audit conducted during the reporting period." Second, it would add a new subsection (f) to section 17 of the CIA Act imposing upon the Director of the CIA the following requirement:

> (f) pursuant to section 501(a)(2) of the National Security Act of 1947, the Director of Central Intelligence shall provide to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives any report of an inspection, investigation, or audit conducted by the Office of Inspector General which has been requested by either committee.

This Department opposes enactment of this measure.

We note first that the proposed new subsection (f) is unconstitutional. Congress may impose legal duties through legislation only by following the procedures established in the Constitution. Congress may not impose legal duties, including reporting duties, by allowing congressional committees to exercise legislative power. *INS. v. Chadha,* 462 U.S. 919, 952 (1983) (only a statute may alter "the legal rights, duties and relations of persons * * * outside the Legislative Branch"). The proposed amendment would empower the committees, acting alone, to request, and thereby obligate, a member of the executive branch to report to them. This offends the requirements of bicameralism relied upon in *Chadha.* In addition, many such reports will reveal material privileged as internal deliberations of the executive branch. Others may contain national security information which the President may not be required to share with Congress; although he may (and often does) voluntarily share such information with Congress. Therefore, even apart from any problems presented under Chadha, this provision may be seen as infringing upon the President's authority to protect confidential information within the executive branch.

Even if this concern is addressed, we have serious doubts as to the constitutionality of the requirement that the Director of Central Intelligence inform the relevant committees of the title or subject matter of each Inspector General report and provide copies of any report requested. Article II of the Constitution vests in the President special authority and responsibility for the actual conduct of national defense and the protection of information important to the national security. That authority may not be infringed, and any reporting requirement in this area would have to be construed so as to avoid any conflict with it. In addition, in assessing the constitutionality of any reporting requirement it must be borne in mind that the President, not Congress supervises the operations of the executive branch; this fundamental feature of our consitutional system imposes further limits on the power of Congress to require reports from the executive.

In short, the proposed amendment consists of one provision that is facially unconstitutional and another that appears capable of unconstitutional application in many situations. The Department of Justice therefore opposes the amendment.

In closing, we emphasize that the Administration has and will continue to share information—even if classified—with Congress whenver necessary and appropriate. This letter does not change that position. Our objection is to the imposition of a legal requirement that information be shared, not to the sharing of information.

The Office of Management and Budget has advised that the enactment of the above-described amendment concerning the CIA Inspector General would not be in accord with the program of the President.

Sincerely,

CAROL T. CRAWFORD,
Assistant Attorney General.

APPENDIX B

MEMORANDUM FROM THE OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES

To: The Honorable Anthony C. Beilenson.
From: Steven R. Ross, General Counsel to the Clerk and Charles Tiefer, Deputy General Counsel to the Clerk.
Re Justice Department Assertion that Reporting Requirements Are Unconstitutional.

By letter of July 18, 1989, Carol T. Crawford, the Assistant Attorney General for the Office of Legislative Affairs, has asserted that a proposed amendment adding a reporting requirement to the Intelligence Authorization bill would be unconstitutional. We have been asked to respond to this assertion. Ms. Crawford's opinion is patently without merit.

ANALYSIS

A proposed amendment to H.R. 1748, the FY 1990 Intelligence Authorization bill, would add a new subsection 17(f) to the CIA Act:

> (f) pursuant to section 501(a)(2) of the National Security Act of 1947, the Director of Central Intelligence shall provide to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives any report of an inspection, investigation, or audit conducted by the Office of Inspector General which has been requested by either committee.

Ms. Crawford notes that "The proposed amendment would empower the committees, acting alone, to request, and thereby obligate, a member of the executive branch to report to them." She opines that "the proposed new subsection (f) is unconstitutional" because "this offends the requirement of bicameralism relied upon in [INS v. *Chadha* [462 U.S. 919, 952 (1983)]," since "Congress may not impose legal duties, including reporting duties, by allowing congressional committees to exercise legislative power."

This argument is ridiculous. Article I of the Constitution has been interpreted by the Supreme Court literally dozens of times as upholding the contempt of Congress statute which, in Ms. Crawford's words, "empower[s] the committees [of Congress], acting alone, to request, and thereby obligate, a member of the executive branch to report to them." Few principles have been so firmly established in separation of powers law as that Congress may empower its committees to obtain information through imposing obligations—by subpoena, immunity order, contempt, and, in this instance, by reporting requirement.

The First Congress, authoritative interpreter of the Constitution, in one of its first acts, when creating one of the three original Cabinet Departments—the Treasury Department—imposed a reporting requirement to be invoked by Congressional bodies. The statute made it "the duty of the Secretary of the Treasury * * * to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the House of Representatives or the Senate, or which shall appertain to this office." Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65 (1789). With slight modifications, the statute has remained in effect for two centuries. 31 U.S.C. § 1002.[1] Hundreds of successor statutes impose similar requirements. In *Chadha* itself, the Supreme Court, after holding legislative vetoes unconstitutional, distinguished such statutory reporting requirements: "formal reporting requirements, lie well within Congress' constitutional power. . . . See also n.9 supra." 462 U.S. at 955 n.19. The footnote referred to, note 9, discusses other reporting requirements. Id. at 935 n.9. Most recently, in upholding the independent counsel statute against attack by the Department of Justice, the Supreme Court noted the statute's provisions that certain Congressional Committee Members could trigger a sequence ending in a reporting requirement, and confirmed that such statutes were perfectly constitutional. "[T]he Attorney General . . . must respond within a certain time limit. § 529(g). Other than that, Congress' role under the Act . . . [in] receiving reports or other information and oversight of the independent counsel's activities, § 595(a), functions that we have recognized generally as being incidental to the legislative function of Congress. See *McGrain* v. *Daugherty,* 273 U.S. 135, 174 (1927)." *Morrison* v. *Olson,* 108 S. Ct. 2597 (1988).

Ms. Crawford's letter adds in other complaints about the provision to the effect that it "may be seen as infringing upon the President's authority to protect confidential information within the executive branch." If this argument were taken seriously, it would be an assertion by the Justice Department that the whole structure of intelligence oversight is unconstitutional, as it is all based on reporting obligations, such as the Hughes-Ryan statute's duty to report findings for covert actions. Of course, intelligence oversight is constitutional. From the first administration, when the House required the providing of military records regarding the disastrous St. Clair expedition, and the Senate required the providing of foreign affairs records regarding the Jay Treaty,[2] Congress has insisted on reporting on national security confidential information. Without such information, Congress in general, and the intelligence committees in particular, could not do their job.

In conclusion, it is amazing that a Justice Department official would maintain seriously that it is unconstitutional for Congress to impose reporting requirements on intelligence agencies. The expression of that view gives the appearance that the Justice Department has ceased considering its position seriously before opining that statutes would be unconstitutional.

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[1] For a full discussion, see Tiefer, "Independent Executive Officers as Checks on Abuses of Executive Power," 53 B.U.L. Rev. 59, 71–72 (1983), and sources cited.

[2] R. Berger, "Executive Privilege: A Constitutional Myth" 167–79 (St. Clair campaign, and Jay Treaty).

APPENDIX C

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, August 2, 1989.

To: Honorable Anthony Beilenson, Chairman, House Permanent Select Committee on Intelligence. (Attention of Bernard Raimo, Jr.)

From: American Law Division.

Subject: Constitutionality of Requiring the CIA Director to Transmit Inspector General Reports Requested by the House or Senate Intelligence Committees.

Section 17 of the Central Intelligence Act of 1949,[1] as added by the Intelligence Authorization Act, FY 1989,[2] requires that the Director of Central Intelligence (Director) provide the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence certain specified reports regarding activities by or concerning the agency's Inspector General (IG). These include a report on the selection of an Inspector General; [3] a report on the reasons for the removal of an Inspector General; [4] semi-annual reports summarizing the activities of the Inspector General's office for each six month period; [5] a report of any decision by the director to prohibit the initiation, carrying out, or completion of an Inspector General investigation within seven days of such a decision; [6] and a report on any decision of the Director which would substantially affect the ability of the Inspector General to carry out his duties and responsibilities, including the position taken by the Inspector General on the matter, within seven days of such decision.[7] H.R. 2748, the FY 1990 Intelligence Authorization bill, would make two additions to the reports requirements. First, the Director's semi-annual report would have to list "the title or subject of each inspection, investigation or audit conducted during the reporting period." Second, the Director would now be required to furnish "any report of an inspection, investigation, or audit conducted by the Office of Inspector General which has been requested by either committee." [8]

[1] 40 U.S.C.A. 403q (1989 Suppl.).
[2] Pub. L. No. 100-453, Sec. 504 (1988).
[3] 50 U.S.C.A. 403q(a).
[4] 50 U.S.C.A. 403q(b).
[5] 50 U.S.C.A. 403q(c).
[6] 50 U.S.C.A. 403q(d).
[7] 50 U.S.C.A. 403q(e).
[8] Proposed section 403q(f). In his statement on signing the FY 1989 authorization into law, President Reagan raised constitutional objections to the requirement of section 403q(e) that the Director disclose to the intelligence committees the IG's recommendation and position with re-

Continued

The Department of Justice's Office of Legislative Affairs (DOJ) has raised constitutional objections to the proposed additions.[9] With respect to the Director's provision of IG reports requested by the committees, DOJ asserts that such a requirement violates the principles established by *INS v. Chadha* [10] in that it "would empower the committees, acting alone, to request, and thereby obligate, a member of the executive branch to report to them, thus offending "the requirement of bicameralism relied upon in *Chadha*." This provision is also objected to on the ground that it "infringe[es] upon the President's authority to protect confidential information within the executive branch." Revelation of the titles and subject matter of IG reports in the Director's semi-annual report is challenged as violative of the President's "special authority and responsibility [under Article II] for the actual conduct of national defense and the protection of information important to the national security." Finally, DOJ raises a question as to the constitutional efficacy of any congressionally imposed reporting requirement: "In addition, in assessing the constitutionality of any reporting requirement it must be borne in mind that the President, not Congress, supervises the operations of the executive branch; this fundamental feature of our constitutional system imposes further limits on the power of Congress to require reports from the executive."

You have inquired as to the substantiality of DOJ's constitutional objections. We conclude, based upon a review of recent relevant Supreme Court decision and the longstanding historic congressional practice with respect to executive reporting requirements, that the reporting requirements proposed by H.R. 2748, as well as those now required by section 17 of the Central Intelligence Act of 1949, are likely to withstand constitutional scrutiny by a reviewing court.

It may be noted at the outset that DOJ's position in the instant matter is not an isolated instance of resistence to the particular provisions in question here, but is reflective of a broader pattern of opposition to congressional proposals that seek to limit the Executive's control over subordinate executive branch officials by such means as limitations on the President's ability to remove his appointees at will or requiring direct reporting to the Congress.[11] Most recently, and highly pertinent to the matter under consideration, the Department of Justice's Office of Legal Counsel (OLC) issued an opinion on March 24, 1989 advising that, except in the most "extraordinary circumstances," IG's should not acceded to congressional requests for information with respect to ongoing investigations: "[W]e can advise that as a general matter Congress has a limited oversight interest in the conduct of an ongoing crimi-

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spect to any decision by the Director which affects the implementation of his duties and responsibilities on the ground that "[s]uch a requirement would conflict with the constitutional protection afforded the integrity and confidentiality of the internal deliberations of the Executive branch." 24 Weekly Comp. Pres. Doc. 1233 (Sept. 29. 1988).

[9] Letter dated July 18, 1989, to Honorable Anthony C. Beilenson, Chairman, House Permanent Committee on Intelligence from Assistant Attorney General Carol T. Crawford, Office of Legislative Affairs, U.S. Department of Justice.

[10] 462 U.S. 919 (1983) (one-House legislative veto unconstitutional).

[11] For a detailed review of the development of this pattern of opposition to congressional controls, see Rosenberg, "Congress' Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," 57 Geo. Wash. L.Rev. 627 (1989) (hereinafter Unitary Executive).

nal investigation and the executive branch has a strong interest in preserving the confidentiality of such investigations. Accordingly, in light of established executive branch policy and practice, and absent extraordinary circumstances, an IG should not provide Congress with confidential information concerning an open criminal investigation." [12] The OLC opinion also concluded that the Inspector General Act [13] does "not require IG's to disseminate confidential information pertaining to open criminal investigations." [14] The Justice Department of late has almost uniformly opposed proposed legislation that contains for cause removal limitations or direct reporting requirements.[15]

DOJ's position rests on a view of the executive branch as a highly centralized bureaucratic structure. This model of governance envisions a unified and hierarchical executive with the President at the apex and all administrative agencies arrayed below him. It views the President, in his role as the only nationally elected official of the federal government, as the possessor of broad supervisory and managerial powers as well as an encompassing political presence in administrative agencies. The Chief Executive's constitutional duty to see that the laws are faithfully executed under Article II, section 2 is seen as providing both the responsibility and the authority to intervene in administrative decisions in order to set priorities, allocate limited resources, balance competing policy goals, resolve conflicting jurisdictions and responsibilities of agencies, and assure that programs are effectively and efficiently managed. Support for this proposition is founded on language in the Supreme Court's opinion *Myers v. United States* where it stated that "[t]he ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." [16]

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[12] Memorandum dated March 24, 1989 for Oliver B. Revell, Chairman, Investigations/Law Enforcement Committee, President's Council on Integrity and Efficiency, entitled "Congressional Request for Information From Inspectors General Concerning Open Criminal Investigations," from Assistant Attorney General Douglas W. Kmiec, Office of Legal Counsel, DOJ, at 8-9 (copy attached).

[13] 5 U.S.C. Appendix (1988).

[14] OLC Memorandum supra note 12 at 9-13. The OLC's conclusions and rationale underlying them have been vigorously challenged by the House General Counsel. See, Memorandum dated May 2, 1989 to Honorable Jack Brooks, Chairman, House Judiciary Committee from Steven R. Ross, General Counsel to the Clerk (copy attached).

[15] See, e.g., Letter dated June 12, 1989 to Honorable Lloyd Bentsen, Chairman, Senate Committee on Finance from Assistant Attorney General Carl T. Crawford, Office of Legislative Affairs, DOJ (for cause removal restrictions and reporting requirements in S. 216, the Social Security Reform Act of 1989, deemed unconstitutional); Letter dated May 17, 1989 to Honorable Bruce F. Vento, Chairman, House Subcommittee on National Parks and Public Lands, Committee on Interior and Insular Affairs from Acting Assistant Attorney General Carol T. Crawford, Office of Legislative Affairs, DOJ (for cause removal restrictions and reporting requirements in H.R. 1484 deemed unconstitutional; bill passed House July 17, 1989, 134 Cong. Rec. H. 3767-3779 (daily ed. July 17, 1989)); 24 Weekly Comp. Pres. Doc. 1377 (Oct. 31, 1988) (Presidential statement on pocket veto of S. 508, the Whistleblower Protection Act of 1988 on grounds that for cause removal and direct reporting provisions are unconstitutional; bill enacted into law with controverted provisions in 101st Congress, see Pub. L. 101-12).

[16] *Myers v. United States, supra*, 272 U.S. 52, 135 (1926). See also *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) rev'd sub. nom. *Morrison v. Olson*, 108 S.Ct. 2597 (1988). For a detailed explanation and critique of the unitary executive theory, see Unitary Executive, *supra* note 11, 57 Geo. Wash. L. Rev. at 649-662.

However, the substantiality of these views of presidential supremacy over the executive bureaucracy werer emphatically rejected by the Supreme Court's decisions in *Morrison v. Olson,*[17] upholding the validity of the appointment and removal conditions for independent counsel under the Ethics in Government Act, and *Mistretta v. United States,* [18] sustaining the constitutionality of the composition, location and powers of the United Sentencing Commission. In opinions remarkable for their breadth and near unanimity,[19] the High Court unequivocally dealt with the notion of a unitary executive. Addressing the argument of dissenting Justice Scalia in *Morrison* that "the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President," Chief Justice Rehnquist held that "[t]his rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear." [20] In *Mistretta,* Justice Blackmun, rejecting the contention that Congress was without authority to locate any agency with no judicial powers in the Judicial Branch, determined that "[o]ur constitutional principles of separated powers are not violated, however, by mere anomaly or innovation * * * Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary." [21] In both decisions the Court expressed unequivocal; approbation of a very far reaching though not limitless, power in Congress over agency structure, location and relationships that may properly have as its principal object the desire to limit the President's influence over the development and implementation of administration policy. The Court underlined its intended deference to the congressional prerogative in the area by adopting the pragmatic, balancing approach first enunciated in *Nixon v. Administrator of General Service* [22] for such agency relationship type cases, an approach that has yet to produce even a single limitation on the exercise of legislative power in separation litigation.

The Court specifically dealt with a for cause removal limitation issue in *Morrison v. Olson.* There it has been argued that since an independent counsel is removable by the Executive, through the Attorney General, only for "good cause," such statutory limitation on the President's "at will" removal authority of an officer who is exercising purely executive functions unduly interferes with the President's constitutional duties and prerogatives and thereby violates separation of powers principles. In rejecting this contention,

[17] 108 S. Ct. 2597 (1988).
[18] 109 S. Ct. 647 (1989).
[19] Only Justice Scalia dissented in both cases.
[20] 108 S. Ct. at 2618, note 29.
[21] 109 S. Ct. at 661.
[22] 433 U.S.C 425, 443 (1977).

the Court reconciled its confusing prior jurisprudence on removal, and at the same time put to rest any hopes of any expansion of presidential power over agencies.

The Court held that the validity of insulating an inferior officer from at will removal by the President will no longer turn on whether such an officer is performing "purely executive" or "quasi" legislative or "quasi" judicial functions. The issue raised by a for cause removal limitation, the majority opinion explained, is whether it interferes with the President's ability to perform his constitutional duty.[23] It is in that light that the function of the official in question must be analyzed. In the case before it the Court noted that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by Executive Branch officials. But, the Court held, the exercise of prosecutorial discretion is in no way "central" to the functioning of the Executive branch. Further, since the independent counsel could be removed by the Attorney General, this is sufficient to ensure that she is performing her statutory duties, which is all that is required by the "take care" clause.[24] Finally, the limited ability of the President to remove, through the Attorney General, the independent counsel was also seen as leaving enough control in his hands to reject the argument that the scheme of the Ethics in Government Act impermissibly undermines executive powers or disrupts the proper constitutional balance by preventing the Executive from performing his functions.[25] Although the Court did not define with particularity what would constitute sufficient "cause" for removal, it did indicate that it would at least encompass misconduct in office.[26]

In sum, then *Morrison* appears to vitiate the essential supporting legal rationale of the unitary executive theory, *i.e.,* that the President must have the absolute discretion to direct, control and discharge at will subordinate officials whose functions include purely executive task. *Morrison* teaches that there are no rigid categories of officials who may or may not be removed at will. The question that arises in such cases is whether a for cause provision impermissibly undermines executive powers or would disrupt the proper balance between the coordinate branches by preventing the Executive from performing his assigned functions.

Thus the Court in *Morrison* has adopted the pragmatic, functional analysis approach exemplified by *Nixon v. Administrator of General Services*[27] and *Commodity Futures Trading Commission v. Schor*[28] for agency functioning type cases. In such cases there is no issue of one branch attempting to increase its powers at the expense of another as was the situation is *INS v. Chadha* or *Bowsher v. Synar.*[29] Indeed, where the question of agency functioning is involved, the issue of aggrandizement is seen as essentially irrelevant.[30] The key question in disputes over agency arrangements is

[23] 108 S.Ct. at 2617-19.
[24] *Id.* at 2619-20.
[25] *Id.* at 2621-22.
[26] *Id.* at 2620, 2621.
[27] 433 U.S. 425, 443 (1977).
[28] 478 U.S. 833, 851 (1986).
[29] *Morrison v. Olson, supra,* 108 S.Ct. at 2620-21.
[30] Id.

whether so much has been taken from the functioning of one constitutional actor as to impair its core duty. Thus functional analysis comes into play. The Court sees its task as assuring itself that the essential lines of authority from the constitutional actors—Congress, the President, and the Judiciary—to the agencies remain intact. The review of impact on the respective relationships is, then, not concerned solely with aggrandizement but with maintaining the relative functional balance between the constitutional actors and the agencies. Future congressional attempts to insulate decisions and decisionmakers from presidential control to one degree or another will subjected to this somewhat lenient test.[31]

Confirmation of the Court's support of a broad congressional authority over agency structure, and the flexible standard by which it will test such exercises of power, is further evidenced in its 8-1 ruling in *Mistretta v. United States,*[32] rejecting a broad ranging separation of powers challenge to the United States Sentencing Commission. Petitioners argued that the Commission, an independent agency in the Judicial Branch vested with power to promulgate binding sentencing guidelines, violated the separation doctrine by its placement in the Judicial Branch, by requiring federal judges to serve on the Commission and to share their authority with nonjudges, and by empowering the President to appoint Commission members but limiting his power to remove them only for cause.

The Court rejected these contentions and in the course of its opinion reiterated its understanding that the separation principle does not require a rigid compartmentalization of the branches but rather recognizes "that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.' " [33] The function of the separation principle is to preserve this flexibility while guarding against "the accumulation of excessive authority in a single branch" through encroachment and aggrandizement by one branch against another. The Court explained that "[i]t is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' " [34] Reviewing its precedents, it noted those instances where it had "invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive

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[31] Indeed, the first appellate court ruling dealing with such an issue clearly adopted the *Morrison-Schor-Nixon v. Administrator of General Services* approach. In *S.E.C. v. Blinder, Robinson & Co.*, 855 F.2d 677 (10th Cir., 1988), *cert. denied* 57 U.S.L.W. 3552 (U.S. S. Ct. 1989), the Tenth Circuit rejected the argument that the power vested in the Securities Exchange Commission to commence civil enforcement actions was a violation of the separation of powers doctrine in that the President's ability to "take care" that the laws are faithfully executed is impeded because he cannot remove members of the Commission at will—a contention premised on the idea that prosecutorial discretion is a core executive function from which the President cannot be divested.

[32] 109 S.Ct. 647 (1989).

[33] 109 S.Ct. at 659.

[34] Id.

Branch," [35] and contrasted them with cases in which "we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." [36] In these latter situations, which involve the congressional ordering of arrangements within or between agencies in areas of shared responsibility and in which congressional action does not contravene any express constitutional provision, the Court explained that it applies a pragmatic balancing test in which it determines whether the challenged arrangement "prevents the Executive Branch from accomplishing its assigned functions," and, if so, "whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." [37]

The Department of Justice's position with respect to the proposed reports requirements of H.R. 2748, as well as those new currently prescribed by section 17, is arguably wholly consistent with the pragmatic approach reflected in the Supreme Court's most recent separation of powers opinions. Thus the Court in *Mistretta* stated that "our principle of separation of powers anticipates that the coordinate branches will converse with each other on matters of vital common interest." [38] In *Morrison* the Court characterized "Congress" role under the [independent counsel statute] * * * of receiving reports or other information and oversight of the independent counsel's activities" as being "incidental to the legislative function of Congress".[39]

However, Congress, authority to impose direct reporting requirements on agency officials, while amply supported by the case law just reviewed, also rest independently on Congress' constitutional prerogative to inform itself in aid of its legislative functions. Here both historical practice and judicial precedent support the validity of such provisions.

It is well settled that Congress in legislating pursuant to the powers granted it under Article I, section 8 of the Constitution, as well as powers granted in other parts of the Constitution, has the authority, under the Necessary and Proper Clause, Act. I, § 8, cl. 18, to create the bureaucratic infrastructure of the Executive branch and to determine the nature, scope, power and duties of the offices so created.[40] Moreover, as a general matter, the Supreme Court has spoken very broadly of the legislative power over offices. Where Congress deals with the structure of an office—its creation, location, abolition, powers, duties, tenure, compensation and other

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[35] Id. at 660, citing *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not retain removal power over officer exercising executive functions); *INS v. Chadha*, 462 U.S. 919 (1983) (Congress may not control execution of laws except through Article I procedures); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (Congress may not confer Article III power on Article I judges).

[36] Id. at 660, citing *Morrison v. Olson*, 108 S.Ct. 2597 (1988) (upholding judicial appointment of independent counsel and limiting presidential removal for cause); and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) (upholding agency's assumption of jurisdiction over state-law counterclaims).

[37] Id., citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1979); *Commodity Futures Trading Commission v. Schor, supra*, 478 U.S. at 851; and *Morrison v. Olson, supra*, 108 S.Ct. at 2620-21.

[38] *Mistretta, supra*, 109 S. Ct. at 673.

[39] *Morrison, supra*, 108 S. Ct. at 2621, citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

[40] *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

such incidents—its power is virtually plenary.[41] Only where the object of the exercise of the power is clearly seen in the particular situation as an attempt to effect an unconstitutional purpose, e.g., congressional appointment or removal of an officer,[42] have the courts felt constrained to intervene. As has been noted, most recently the Court in *Morrison* reaffimed Congress' authority to require the submission of reports and other information to it from officials, and the exercise of oversight over agencies, "as functions that we have recognized generally as being incidental to the legislative function of Congress." [43]

With particular regard to the subject matter in question, the Supreme Court in *Nixon v. Administrator of General Services* has occasion to note that "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch" and that "[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." [44] There the Court cited with apprvoal the Freedom of Information Act,[45] the Privacy Act of 1974,[46] the Government in the Sunshine Act,[47] the Federal Records Act,[48] and provisions concerned with census data [49] and tax returns [50] as appropriate instances of such regulation. In *Nixon* itself, the Court upheld the Presidential Recordings and Materials Preservation Act,[51] which regulates, inter alia, public access to President Nixon's presidential papers, against presidential claims of violations of the doctrines of separation of powers and executive privilege.

In fact, statutory requirements that Executive branch officials report directly to the Congress trace their roots to the very first Congress. The legislation establishing the Treasury Department required the Secretary to report to Congress "and generally perform all such services relative to the finances, as he shall be directed to perform." [52] Pursuant to this mandate, Alexander Hamilton, the first Secretary of the Treasury, submitted seminal reports to the Congress at the direction of the House of Representatives. Each report begins with an acknowledgement of the order of the House which had directed him to report.[53] Prior to the passage of the Budget and Accounting Act of 1921,[54] which established the President authority over the agency budget process, each agency has submitted its annual budget request directly to Congress. Findings

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[41] See, e.g., Crenshaw v. United States, 134 U.S. 99, 105–06 (1890)); *Morrison v. Olson*, 108 S.Ct. 2597 (1988); *Mistretta v. United States*, 109 S.Ct. 647 (1989).

[42] See *Buckley v. Valeo*, 424 U.S. 1 (176), *Bowsher v. Synar, 478 U.S. 714 (1986).*

[43] *Morrison v. Olson, supra*, 108 S.Ct. at 2621, citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

[44] *Nixon v. GSA*, 433 U.S. 425, 445 (1977).

[45] 5 U.S.C. 522 (1988).

[46] 5 U.S.C 552a (1988).

[47] 5 U.S.C. 552(b)(1988).

[48] 44 U.S.C. 2101 *et. seq* (1982).

[49] 13 U.S.C. 8–9 (1982).

[50] 26 U.S.C. 6103 (1982).

[51] 44 U.S.C. 2201 (1982).

[52] Act of September 2, 1789, ch. 12, sec. 2, 1 Stat. 65, 66.

[53] See, e.g., Report of Public Credit, 2 Annals of Congress 1991 (1790); Report on a National Bank, id., 2031; Report on Manufactures, 3 Annals of Congress 971 (1791) ("The Secretary of the Treasury, in obedience of the order of the House of Representatives * * * ").

[54] 42 Stat. 20 (1921).

the process inefficient and unwieldy, Congress created the Bureau of the Budget (now the Office of Management and Budget) to review the morass, of agency budgetary information and to approve agency budget requests.[55] In addition to authority to review and approve agency budget requests, the Bureau was subsequently authorized to clear proposals for legislation or agency comments on proposed legislation.[56]

However, Congress' voluntary relinquishment of this authority has not been unequivocal. Either House may request an agency official to submit directly to it "an appropriation estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government." [57] Also, Congress has selectively required simultaneous or unaltered submission of budget requests and legislative proposals and comments that limit review by OMB of budget requests, legislative proposals, review of proposed agency rules, and other required reports and documents. Thus, since 1973, Congress has mandated that the budget requests of the U.S. Postal Service,[58] and the U.S. International Trade Commission,[59] submitted to Congress without revision, and that the budget requests and legislative proposals of other agencies be submitted concurrently to OMB and the Congress.[60] Also, Congress has exempted the Securities and Exchange Commission, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and the National Credit Union Administration from OMB clearance of their legislative proposals and comments.[61] OMB also has been precluded from imposing E.O. 12,291 review on Agricultural Marketing orders of the Department of Agriculture or regulations of the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department.[62] OMB may review reports to Congress required of the Secretary of Health and Human Services but it may not revise them or delay their timely submissions.[63] Reports and documents

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[55] See generally, L. Fisher, Presidential Spending Power, ch. 1 (1975).

[56] See Reorganization Act of 1939, ch 36, tit. II, 53 Stat 565 (codified at 31 U.S.C. 1108 (1982)).

[57] 31 U.S.C. 1108(e)(1982).

[58] See Act of June 30, 1974, Pub. L. No. 93-328, § 23, 88 Stat. 287 (codified at 39 U.S.C. § 2009 (1982)).

[59] See Trade Act of 1974, Pub. L. No. 93-618, § 175(a)(1), 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2232 (1976)).

[60] See, e.g., Privacy Act of 1974, Pub. L. No. 93-579, § 5(a)(5), 88 Stat. 1896 (reprinted in 5 U.S.C. § 552a app., at 318 (1976) (Privacy Protection Study Commission); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 101(a)(3), 88 Stat. 1389 (1974) (codified at 7 U.S.C. § 4a(h)(1)-(2)(1982)) (Commodity Futures Trading Commission); Consumer Product Safety Act, Pub. L. No. 92-573, § 27(k), 86 Stat. 1207 (1972) (codified at 15 U.S.C. § 2076(k) (1982) (Consumer Product Safety Commission); Hazardous Materials Transportation Act, Pub. L. No. 93-633, § 304(b)(7), 88 Stat. 2156 (1975) (codified at 49 U.S.C. § 1903(b)(7)(1982)) (National Transportation Safety Board); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1122 (codified at 5 U.S.C. § 1205(j)(1982) (Merit Systems Protections Board); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 311, 90 Stat. 60 (codified at 31 U.S.C. § 1108(f)(1982)) (Interstate Commerce Commission); Department of Energy Act, Pub. L. No. 95-91, § 401, 91 Stat. 582 (codified at 42 U.S.C. § 717(j)(1982))(Federal Energy Regulatory Commission); AMTRAK Improvement Act of 1973, Pub. L. No. 93-146, § 12, 87 Stat 553 (codified at 45 U.S.C. § 601(d)(1976) (National Railroad Passenger Corporation); Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 2021, 87 Stat. 990 (Codified at 45 U.S.C. § 712(f)(1982)) (U.S. Railway Association).

[61] Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500 (codified at 12 U.S.C. § 250 (1982)).

[62] Executive Office Appropriations Act, 1987, as included in Public Laws 99-500 and 99-591, section 101(m).

[63] 42 U.S.C. 242m (a)(3) (1982).

required by Congress of the Inspector General of the Department of Energy need no clearance or approval beyond the Secretary of Energy or Federal Energy Regulatory Commission.[64] And no clearance is required for reports of the Chief Counsel of the Office of Advocacy of the Small Business Administration.[65]

Moreover, the statute books are replete with Executive Branch reporting requirements that range from periodic general submissions to reports that may be triggered by the occurrence of a specified event or executive action or by the mandate of a House or individual committee. At present, some 482 such reporting requirements are imposed on the President himself in all areas of his executive purview, including the areas of national defense and security and foreign affairs.[66] Over 3,250 reports are required of cabinet level departments and independent agencies, boards and commissions, including twelve such requirements on the CIA, including those pertaining to the CIA IG in question here.[67] As with the presidential reporting requirements, the substantive areas of policy implementation covered encompass national defense, national security, and foreign affairs. Thus the practice of requiring executive reports to the Congress has a strong historic foundation. Its legal support appears equally substantial.

The Supreme Court has long recognized the validity of direct reporting requirements.[68] In *INS v. Chadha,* contrary to the assertion of the DOJ memorandum, the Court carefully noted that in invalidating all forms of the legislative veto, it was not casting any doubt on congressional reporting requirements. The Court emphasized that its limitation on the veto device—

> does not mean that Congress is required to capitulate to "the accretion of policy control by forces outside its chambers * * *" The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power.[69]

At the core of this aspect of congressional authority is the recognition of the legislature's need for reliable information in order to fulfill its constitutionally mandated functions. As a general proposition it may be posited that, in the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon

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[64] 42 U.S.C. 7138(f) (1982).

[65] 15 U.S.C.A. 634 (1989 Suppl.).

[66] Clerk, U.S. House of Representatives, "Reports To Be Made To Congress", House Doc. No. 101-17, pp. 13-34, 101st Cong., 1st Sess. (1989).

[67] *Id.* at 38-167.

[68] See, *e.g., INS v. Chadha,* 462 U.S. 919, 935 nn. 9 and 19 (1987); *Sibbach v. Wilson and Co.,* 312 U.S. 1 (1941).

[69] *Chadha,* 462 U.S. at 955 n.19. The *Chadha* court also cites a number of instances in which the Constitution explicitly allows legislative action by one House. See 462 U.S. at 955-56. Included in those exceptions is the power of each House under Art. I, sec. 5, cl. 2 to "determine the rules of its proceedings." That authority, together with its implicit authority to oversee and investigate in aid of its legislative function, underlies the unquestionable ability of authorized committees to issue compulsory process. See, e.g., *McGrain v. Daugherty,* 273 U.S. 135, 151 (1927). It would seem anomalous to argue that Congress cannot demand in advance by law what it may contemporaneously compel by the action of a committee alone.

its authority, the Congress (and its committees) has plenary power to compel information needed to discharge its legislative function from executive agencies, private persons, and organizations, and, within certain constraints, the information so obtained may be made public. The fact that the Executive has determined for its own internal purposes that a particular item should not generally be disclosed does not prevent either House of Congress, or its committees and subcommittees, from obtaining and publishing information that it considers essential for the proper performance of its functions. The case law delineating Congress' expansive oversight authority demonstrates its virtually plenary power in this area.

Thus, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purpose of performing its legitimate functions, the practice of the British Parliament and numerous decisions of the Supreme Court of the United States have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress.[70] Chief Justice Warren speaking for the Court in *Watkins* described the power as follows:

> We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possible needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress * * * Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.[71]

Legitimate legislative tasks encompassing the power have been defined as activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[72]

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[70] *McGrain v. Daughterty*, 273 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); see also, *United States v. A.T.T.*, 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

[71] 354 U.S. at 187.

[72] *Gravel v. United States*, 408 U.S. 606, 625 (1973).

In *Eastland v. United States Servicemen's Fund,* the Court reiterated its view that the power of effective congressional inquiry is an integral part of the legislative process:

> The power to investigate and to do so through compulsory process plainly falls with [the *Gravel* definition of legitimate legislative tasks]. This Court has often noted that the power to investigate in inherent in the power to make laws because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty,* 273 U.S. 125, 175 (1927), * * * Issuance of subpoenas such as the one in question here has long been held to be a legitimate used by Congress of its power to investigate * * *
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> "[W]here the legislative body does not itself posses the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, as some means of compulsion are essential to obtain what is needed." *McGrain v. Daughtery, supra,* at 175.[73]

These broad principles of congressional investigatory authority apply *a fortiori* to the exercise of Congress' Article I power to create the agencies and offices necessary to carry out its policy directives and to devise effective mechanisms to ensure that those directives are carried out.[74] Anticipation of a legislative need to know accurately what an agency official actually thinks with respect to his agency's budget, or about changes in this agency's legislative authority, or, as in the instant situation, where an officer has been installed specifically to ferret out agency fraud, corruption or waste, to know if that task is being effectively carried out, whether reflected in an identifiable document or in his personal knowledge, would appear well within the congressional prerogative. The legislative history of the Inspector General Act [75] underlines this very expectation.

In creating the office of Inspector General, Congress pointedly prescribed their obligation as that of keeping "the Congress fully and currently informed, by means of the reports required by section 5 *and otherwise,* concerning fraud and other serious problems, abuses and deficiencies relating to the administration of programs and operation administered or financed by such establishment * * *." [76] Section 5 requires the filing of detailed semi-annual reports by each agency IG with the head of that agency who, in turn, must submit those reports, along with his appropriate comments, to the Congress within 30 days.[77] Rep. Jack Brooks, the House Floor Manager of the Inspector General bill, explained that "there is no prohibition [in the bill] with respect to filing [with congressional

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[73] *Eastland v. United States Service's Fund,* 421 U.S. 491, 504–505 (1975).
[74] *Buckley v. Valeo, supra,* at 138.
[75] Pub. L. 95–452, codified at 5 U.S.C. Appendix (1988).
[76] 5 U.S.C. App. 4(a)(5) (emphasis supplied).
[77] 5 U.S.C. App. 5(a), (b).

committees] all the information which Congress wants. We will be able to get it. There is no problem about it." [78] In spelling out precisely what was intended by its agreement with the Senate that some investigation details would not go into the published semiannual reports, a colloquy between Rep. Bauman and Rep. Brooks is instructive. Rep. Bauman stated: "It would just seem to me to be pointless to pass this legislation unless, as part of each committee's oversight function, the committee had complete access to all records of the investigations of these Inspectors General. Otherwise, the bill is unnecessary." Rep. Brooks agreed and explained. "If the gentleman would yield further, Mr. Speaker, we will have complete access to the records if we request them. It just will not be part of the routine. I would say to my distinguished friend, the gentleman from Maryland [Mr. Bauman], that there is no prohibition with respect to filing all the information which Congress wants. We will be able to get it. It is just that it will not be routinely printed in the semiannual reports." [79] Making clear what the Senate had done and why, Rep. Brooks said: "I would say that the Senate felt that it was not necessary to list [the investigated] people in the public document when the investigation was over. The list of investigated individuals is fully available to congressional committees at any time, and we could put it in a standing order to get them if we needed them." [80] The provision of H.R. 2748 requiring specific reports at the request of either intelligence committee is the "standing order" referred to by Rep. Brooks. The bill therefore, makes explicit for the CIA IG what the Inspector General Act makes at least implicit for all other IG's.

Although the DOJ memorandum of July 18, 1989 does not directly raise the question whether the pendency or prospect of criminal litigation may serve as a basis to legitimately decline congressional demands for information either in the form of document production or testimony, the OLC challenge to the reporting requirements of the Inspector General Act [81] does join that issue. In this regard, it can be anticipated that a refusal on this ground would be based, *inter alia*, on the need to avoid prejudicial pre-trial publicity, preventing disclosure of the litigants' trial strategy, protecting the indentity of confidential informants, or protecting the rights of innocent third parties. The case law in this area, which has primarily arisen in the context of government litigation where there has been a claim of legislative interference as a consequence of a congressional investigation, has generally upheld the Congress' right to probe the Executive's conduct of litigation or the underlying circumstances that have given rise to litigation or prosecution despite the pendency of a particular case. At the same time, it has been recognized that the rights of third parties may be affected in the process and that accommodations may have to be made to preserve such rigths while not inhibiting the power of Congress to obtain information. In view of the as yet hypothetical nature of the Justice Department's claim as to the instant situation, the following dis-

[78] 124 Cong. Rec. 32032 (1978) (Rep. Brooks).
[79] 120 Cong. Rec. 32032 (1978).
[80] *Id.*
[81] See notes 11-15, *supra*, and accompanying text.

cussion will focus on the development of the law in this area in the context of interbranch disputes. There is no reason to believe that the law or logic underlying its development would alter in the face of the absence of the government as one of the possible litigants.

The reasons advanced by the Executive for declining to provide information to Congress about judicial proceedings have included avoiding prejudicial pre-trial publicity, protecting the rights of innocent third parties, protecting the identity of confidential informants, preventing disclosure of the government's strategy in anticipated or pending judicial proceedings, and precluding interference with the President's constitutional duty to faithfully execute the laws.[82] Although these reasons are most relevant to criminal cases, in 1982 the Executive branch initially refused to comply with a congressional demand for Environmental Protection Agency documents in open law enforcement files which were alleged to be "sensitive" to civil judicial proceedings related the EPA enforcement of the Superfund legislation. At the direction of the President, executive privilege was invoked and the documents were only provided to the commitee after EPA Administrator Gorsuch had been cited for contempt of Congress.[83] The General Counsel to the Clerk of the House vigorously disputed the notion that Executive Branch concerns about disclosing information on criminal cases are applicable to congressional requests for documents or testimony concerning civil actions.[84]

Despite the Executive branch policies restricting disclosure concerning judicial proceedings, in various executive-legislative disputes over congressional access, Congress has been provided with information about both criminal and civil proceedings. Congress succeeded in obtaining information concerning enforcement of the Superfund legislation as was just noted,[85] and in several sensitive criminal proceedings, including the Abscam investigation.[86]

The Supreme Court has recognized Congress' right to investigate the government's conduct of civil and criminal litigation. In the leading case of *McGrain v. Daugherty,*[87] the Senate had appointed a select committee to investigate the alleged failure of the Justice Department to prosecute and defend certain civil and criminal actions to which the government was a party. The Supreme Court upheld the action of the Senate in citing the brother of the Attorney General for contempt of Congress for failure to comply with a subpoena issued by the select committee. The Court determined that the subject of the investigation—"whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrong-

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[82] A leading statement of the executive branch position is found in an opinion of Attorney General Robert Jackson. 40 Op. A.G. 45 (1941).

[83] See generally H.R. Rept. No. 97-968, 97th Cong., 2d Sess. (1982).

[84] *Id.* At 58.

[85] See Investigation of the Environmental Protection Agency: Report on the President's Claim of Executive Privilege over EPA Documents, Abuses in the Superfund Program, and Other Matters, 98th Cong., 2d Sess. 23-24 (House Energy and Commerce Comm. Print 98 AA, 1984).

[86] For a discussion of precedents regarding congressional access to criminal investigations, see Ehlke, Congressional Access to Information From the Executive: A Legal Analysis 64-65 (CRS Rept. No 86-50A, 3/10/86). See also memorandum from general Counsel to the Clerk to the House, reprinted in H.R. Rept. No. 97-968, *supra* note 83 at 58.

[87] 273 U.S. 135 (1927).

doer"—was clearly one on which legislation could be enacted and was within the jurisdiction of the Senate to investigate.[88]

The courts have also explicitly held that agencies may not deny Congress access to agency documents, even in situations where the inquiry may result in the exposure of criminal corruption or maladministration of agency officials. As the Supreme Court has noted, "But surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding * * * or when crime or wrongdoing is exposed." [89] Nor does the actual pendency of litigation disable Congress from investigating facts which have a bearing on that litigation, where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills.[90]

Although several lower court decisions have recognized that congressional hearings may have the result of generating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress' right to conduct an investigation during the pendency of judicial proceedings. Instead, the cases have suggested approaches, such as granting a continuance or a change of venue, to deal with the publicity problem.[91] For example, the court in one of the leading cases, *Delaney* v. *United States,* entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it" but went on to describe the possible consequences of concurrent executive and congressional investigations:

> We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.[92]

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[88] See 273 U.S. at 170, 177-78. Also noteworthy was the investigation by two committees in 1920 and 1921 of the notorious Palmer raids in which, under the direction of the Attorney General, hundreds of persons were illegally arrested, detained and deported. The committees explored at length the specfic abuses by the Department, which at the time were not closed matters. *Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearings Before the House Comm. on Rules, 66th Cong., 2d Sess. (1920); Charges of Illegal Practices of the Department of Justice: Hearings before a Subcomm. of the Sen. Comm. on the Judiciary,* 66th Cong., 3d Sess. (1921).

[89] *Hutcheson* v. *United States,* 369 U.S. 599, 617 (1962).

[90] *Sinclair* v. *United States,* 279 U.S. 263, 294 (1929).

[91] See, *e.g., Delaney* v. *United States,* 199 F.2d 107 (1st Cir. 1952); *United States* v. *Mitchell,* 372 F.Supp. 1239, 1261 (S.D.N.Y. 1973). For discussion of issues in addition to prejudicial publicity that have been raised in regard to concurrent congressional and judical proceedings, including allegations of violation of due process, see H.R. Rept. No. 97-968, *supra* note 83, at 58 *et seq.*

[92] 199 F.2d 107, 114 (1st Cir. 1952). The court did not fault the committee for holding public hearings, stating that if closed hearings were rejected "because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting

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The *Delaney* court distinguished the case of a congressional hearing generating publicity relating to an individual not under indictment at the time (as was Delaney):

> Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity. Also, if as a result of such legislative hearing an indictment is eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently indicted official than would be the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment.[93]

The absence of indictment and the length of time between congressional hearing and criminal trial have been factors in courts rejecting claims that congressionally generated publicity prejudiced defendants.[94] Finally, in the context of administrative proceedings, courts have held that pressures emanating from questioning of agency decisionmakers by members of Congress may be sufficient to undermine the impartiality of the proceeding. Mere inquiry and oversight of agency actions, however, would not necessarily rise to the level of political pressure designed to influence particular proceedings that has been condemned by the courts.[95]

Thus, the courts have recognized the potentially prejudicial effect congressional hearings can have on pending cases. While not questioning the prerogatives of Congress with respect to oversight and investigation, the cases pose a choice for the Congress: congressionally generated publicity may result in harming the prosecutorial effort of the Executive; but access to information under secure conditions can fulfill the congressional power of investigation and at the same time need not be inconsistent with the authority of the

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the consequence that the trial of Delaney on the pending indictment might have to be delayed." 199 F.2d at 114-5. It reversed Delaney's conviction because the trial court had denied his motion for a continuance until after the publicity generated by the hearing, at which Delaney and other trial witnesses were asked to testify, subsided. See also, *Hutcheson* v. *United States*, 369 U.S. 599, 613 (1962) (upholding contempt conviction of person who refused to answer committee questions relating to activities for which he had been indicted by a state grand jury, citing *Delaney*.)

[93] 199 F.2d at 115.

[94] See, *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 102 (1971) (claim of prejudicial pretrial publicity rejected because committee hearings occurred five months prior to indictment); *Beck* v. *United States*, 298 F.2d 622 (9th Cir. 1962) (hearing occurred a year before trial); *United States* v. *Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976), *cert. denied*, 433 U.S. 933 (1977); *United States* v. *Ehrlichman*, 546 F.2d 910, 917 (D.C. Cir. 1976) *cert. denied*, 429 U.S. 1120 (1977); *United States* v. *Mitchell*, 372 F.Supp. 1239, 1261 (S.D.N.Y. 1973) (post-indictment Senate hearing but court held that lapse of time and efforts of committee to avoid questions relating to indictment diminished possibility of prejudice); *United States* v. *Mesarosh*, 223 F.2d 449 (3rd Cir. 1955) (hearing only incidentally connected with trial and occurred after jury selected).

[95] See, *Peter Kiewit Sons, Co.* v. *U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983); *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981); see generally, Rosenberg, *Defining the Limits of Congressional Intercession in Agency Decisionmaking: The Nature and Scope of the Pillsbury Doctrine* (CRS, September 25, 1984), reprinted in Hearings on Oil Industry Mergers Before Subcomms. of House Energy and Commerce Comm., 98th Cong., 2d Sess. 652 (1984).

Executive to pursue its case. Nonetheless, it remains a choice that is solely within Congress' discretion to make, irrespective of the consequences.

The executive also frequently makes a broader claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is therefore limited. Prosecutorial discretion is seen as off-limits to congressional inquiry and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor with respect to pursuing criminal cases.[96] Initially, it must be noted that the Supreme Court has recently rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson,*[97] sustaining the validity of the appointment and removal conditions for independent counsels under the Ethics in Government Act, that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by executive branch officials, but held that the exercise of prosecutorial discretion is in no way "central" to the functioning of the executive branch.[98] The Court therefore rejected a claim that insulating the independent counsel from at-will presidential removal interfered with the President's duty to "take care" that the laws be faithfully executed.[99]

Moreover, it may be further noted that the concept that prosecution is an inherently executive function insulated from outside inquiry or second-guessing is invariably voiced in cases involving private parties seeking to have the courts order the initiation of a prosecution, dictate prosecutorial policy, or terminate a prosecution.[100] These cases have recognized that "[i]n the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the tasks of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary."[101] Thus, judicial reluctance to supervise rather than deference solely to some constitutionally-based exclusivity of the prosecutorial function has motivated these decisions.[102] Furthermore, permitting private parties to utilize the courts to dictate prosecution decisions is a much different proposition than allowing for congressional access to information in the course of congressional oversight of the enforcement of the laws that Congress itself has enacted.

Conceding a separation of powers component to the prosecutorial discretion-congressional access to information situation, however, the test for separation of powers violations can be applied to a congressional access dispute in this context. Thus,

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[96] See, *e.g.,* Contempt of Congress, H. Rept. No. 97-968, 97th Cong., 2d Sess. 38, 61 (1982).
[97] 108 S.Ct. 2597 (1988).
[98] *Id.* at 2619.
[99] *Id.* at 2619-20. See also, *U.S. ex rel Stillwell v. Hughes Helicopter, Inc., et al,* No. CV 87-1840-WOK(Gx), U.S. D.C. C.D. Calif., June 1, 1989 (qui tam suits not violative of separation of powers).
[100] See *e.g., Heckler v. Chaney,* 407 U.S. 821 (1985); Confiscation Cases, 74 U.S. 454 (1869).; *United States v. Cox,* 342 F.2d 167 (5h Cir. 1965); *Nathan V. Smith,* 737 F.2d 1069, 1078-9 (D.C. Cir. 1984) (Bork, J. concurring); *Nader v. Saxbe,* 497 F.2d 667 (D.C. Cir. 1974); *Inmates of Attica v. Rockefeller,* 477 F.2d 375 (2d Cir. 1973); *NAACP v. Meese,* 615 F.Supp. 200 (D.D.C. 1985).
[101] *Inmates of Attica v. Rockefeller,* 477 F.2d at 375.
[102] See, *Wayte v. United States,* 407 U.S. 598 (1985); *Heckler v. Chaney,* 407 U.S. 821 (1985) (Marshall, J. concurring); *Nathan v. Smith,* 737 F.2d at 1078-9.

> [I]n determining whether the [congressional action] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objective within the constitutional authority of Congress.[103]

Congressional oversight and access to documents, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself does not disturb "the exclusive authority and absolute discretion [of the Executive Branch] to decide whether to prosecute a case."[104] The assertion of prosecutorial discretion in the face of a congressional demand for information would seem to be akin to the "generalized" claim of confidentiality made in the Watergate executive privilege cases. That general claim—lacking in specific demonstration of disruption of executive functions—was held to be overcome by the more focused showing of need for information by a coordinate branch of government.[105]

Given the legitimacy of congressional oversight and investigation of the law enforcement agencies of government and the need for access to information pursuant to such activities, a claim of prosecutorial discretion by itself would not seem to be sufficient to defeat a congressional demand for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases. Congress may enact statutes that influence prosecutorial policy and information relating to enforcement of the laws would seem necessary to perform that legislative function. Thus, under the standard enunciated in *Morrison v. Olson* and *Nixon v. Administrator of General Services,* the fact that information is sought on the executive's enforcement of criminal laws would not in itself seem to preclude congressional inquiry.

In the face of this case law and statutory precedent, the efficacy of a claim of violation of the separation of powers doctine as a result of H.R. 2748's reporting requirements is problematic. As has already been noted, in determining whether a statute disrupts the balance between the coordinate branches the Court first asks

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[103] *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977). See also, *Morrison v. Olson, supra,* 108 S.Ct. at 2620–21.

[104] The quoted statement is from *United States v. Nixon,* 418 U.S. 683, 693 (1974) and is often cited as Court recognition of the concept of prosecution as an inherent executive function. However, the statement was dicta and it is not clear that the Court was not merely reiterating the premise of an argument made by the president's counsel relative to the justiciability of the case. After *Morrison v. Olson,* it would appear that continued reliance on it is problematic. *Nixon* was cited in *Heckler v. Chaney* for the proposition that the decision not to prosecute is "generally committed to an agency's absolute discretion." The Court went on, however, to note that "[t]his recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." 105 S.Ct. at 1656. With respect to *Nixon,* Justice Marshall, concurring in *Heckler,* stated:

> "* * * [T]hat half-sentence is of course misleading, for *Nixon* held it an abuse of that discretion to attempt to exercise it contrary to validly promulgated regulations. Thus, *Nixon* actually stands for a very different proposition than the one for which the Court cites it: faced with a specific claim of abuse of prosecutorial discretion, *Nixon* makes clear the courts are not powerless to intervene." 105 S.Ct. at 1663.

[105] *U.S. v. Nixon,* 418 U.S. 683, 705–706, 711–712 (1974).

whether the action of the challenged branch threatens to prevent another "from accomplishing its constitutionally assigned function," and second, "where there is a potential for disruption," it determines "whether that impact is justified by the overriding need to promote objectives within the constitutional power" of the moving branch.[106]

It would be difficult to argue that the reporting requirements in question here on their face aggrandize congressional power in derogation of presidential power. The chief Executive appoints the Director of the DIA and he serves at his pleasure. Thus the President maintains his ability to communicate with the Director and influence his views as to the appropriate conduct of the agency. Also, the legislation in no way blocks a legitimate claim of executive privilege, as that concept has been articulated in *United States v. Nixon.*[107] But the Nixon court expressly declined to opine on the outcome of a direct conflict in powers committed to each of the political branches, Certainly a generalized claim of privilege, such as appears to be the case here, would face no better reception than the similar broad claim asserted by President Nixon. Here, however, a plausible claim might be made that revelation of certain IG reports, or parts of them, could reveal important state secrets or national security information. Such a claim, however well founded, would not end the matter. It would have to be balanced against the need of the committees and the degree of disruption it would impose on the Executive's abilities to carry out the national security and foreign affairs functions undoubtedly committed to him. Among other factors that may be taken into consideration by a court include: (1) whether information in fact involves national security or foreign affairs matters, as well as evidence fraud, abuse or other administrative wrongdoing; (2) the fact that receiving committees are the only committees authorized to receive such reports, have historically received such sensitive materials, have an unquestioned record of confidentiality, and have elaborate procedures for maintaining the secrecy of intelligence information, see, *e.g.,* House Rule XLVIII, and Rules of Procedure for the House Permanent Select Committee on Intelligence, Rules 9 (Receipt of Classified Material) and 10 (Procedures Related Classified or Sensitive Material) (Revised February 1989); and (3) the need for effective oversight of the administration of the CIA's intelligence program.

The potential for disruption of the President's ability to perform his constitutional function is not apparent on the face of the instant proposal. It must be argued that the particular type of presidential communication and control argued for here—an absolute veto power over the transmission to Congress of both sensitive and non-sensitive documents or information—is so central to the President's ability to "take care" that the laws are being faithfully executed that he must have final say whether they are to be used or not. That argument, however, as has been noted, was severely undercut by the *Morrison case.* The Court found that the President's

[106] *Nixon v. Administrator of General Services, supra,* 433 U.S. 425, 441, 443 (1977) citing *United States v. Nixon,* 418 U.S. 683, 711-12 (1974); accord *Mistretta v. Unites States,* 109 S.Ct. 647 (1989); *Morrison v. Olson,* 108 S.Ct. 2597, 2616, 2621 (1988); *Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, 851-52 (1986).

[107] 418 U.S. 683 (1974).

duty under the "take care" clause requires no more than that he have "sufficient" control over the functioning of the independent Counsel to assure that she is carrying out her statutory duties. In that case, the President's ability, through the Attorney General, to remove an independent counsel "for cause" was deemed "sufficient" to ensure that he could perform his constitutional function. The *Morrison* decision would therefore seem to lend strong support to those court rulings which have precluded executive interference with the exercise of discretionary duties vested by Congress in subordinate executive branch officials.[108] Even where, as here, the potential that some situation might arise where highly sensitive material may be implicated, it is likely that a court will, at least in the first instance, allow for an accommodation to be reached.[109] It is not likely that a court would hold a provision such as is involved here unconstitutional on its face. Rather, in light of the precedents and factors just reviewed, it would seem likely that a court reviewing the question would find that the very limited potential for disruption of executive functioning is justified and necessary to support Congress' legislative design with respect to oversight of CIA administration and is sufficiently constrained by institutional safeguards that it does not create a significant impediment to the President's execution of the law.

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[108] See, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). *Kendall v. U.S. ex rel Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838); *Ameron Inc. v. U.S. Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S.Ct. 297 (1989); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), rev'd *en banc* on issue of award of attorneys fees, July 17, 1989; *Public Citizen v. Burke*, 655 F.Supp. 318 (D.D.C. 1987), aff'd, 843 F.2d 1473 (D.C. Cir. 1988); *Gilchrist v. Collector of Customs*, 10 F. Cases 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420).

[109] *United States v. A.T & T.*, 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).